# Petition

81-1566

NO.

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# In the Supreme Court of the United States

OCTOBER TERM, 1981

MANITOWOC ENGINEERING COMPANY
Petitioner

v.

FRED P. TERRY
Respondent

v.

RAYMOND INTERNATIONAL, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

The questions presented here relate to whether or not a federal court has jurisdiction over a petitioner's claim against a non-federal defendant on a tort claim arising exclusively from state law simply because petitioner has asserted a federal claim against another defendant. The questions are:

1. Whether the opinion of the Fifth Circuit unconstitutionally expands the meaning of the "arising under" clause of Article III, Section 2 of the United States Constitution.

2. Whether or not the Fifth Circuit was correct in holding that the jurisidictional principle set forth in *Lone Star Package Car Co. v. Baltimore & O. R. Co.* (5th Cir. 1954) 212 F.2d 147, can be extended to the factual situation presented in this case or whether the jurisdicional issue in the present case is controlled by the rule set forth by the U.S. Supreme Court in *Aldinger v. Howard*, 427 U.S. 1, 96 S. Ct. 2413, 49 L. Ed. 276 (1976).

## LIST OF ALL INTERESTED PARTIES

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2. Raymond International, Inc.

3. Fred P. Terry

4. Employers Insurance of Wausau

5. Travelers Insurance Company

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ON A WRIT OF CERTIORARI
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## PETITION FOR WRIT OF CERTIORARI

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The petition of Manitowoc Engineering Company, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on October 8, 1981.

## OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 658 F.2d 398. The Judgment of the United States District Court of The Eastern District of Louisiana and Amendment thereto (Appendix C) are unreported. Jury interrogatories dated December 4, 1978 (Appendix D).

## JURISDICTION

The order denying a rehearing was entered on January 6, 1982. See Appendix B.

The order granting stay of mandate and time allowed within which to file this petition for certiorari is dated January 25, 1982. See Appendix E.

This petition for certiorari was filed less than ninety days from the date of the denial of the rehearing and within the time allowed by the order dated January 25, 1982. The jurisdiction of this court is invoked under 28 U.S.C. Section 1245 (1).

## CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Article III, Section 2 of the United States Constitution, provides in pertinent part as follows:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases of admiralty and maritime Jurisdiction;-between Citizens of different states."

28 U.S.C. Section 1331 provides:

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Louisiana Revised Statutes, L.S.A.-R.S. 13:3201, provides in pertinent part as follows:

"(a) transaction any business in this state;

(b) contracting to supply services or things in this state;

(c) causing injury or damage by an offense or quasi offense committed through an act or omission in this state;

(d) *causing injury or damages in this state* by an offense or quasi offense committed through an act or omission outside of this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from

> goods used or consumed or services rendered, in this state." (emphasis added)

Louisiana Revised Statutes, L.S.A.-R.S. 13:3202, provides in pertinent part as follows:

> "When personal jurisdiction over a nonresident is based solely upon R.S. 13:3201, only a cause of action arising from acts or omissions enumerated therein may be asserted against him."

## CONCISE STATEMENT OF THE CASE

Terry, a resident of Louisiana, was employed by Raymond International, Inc. and was injured working aboard a fixed platform in the North Sea while rigging a crane manufactured by Manitowoc Engineering Company and purchased by Phillips Petroleum through a British distributor and shipped from Manitowoc, Wisconsin to the North Sea to be installed by Raymond. Raymond International Inc.is a citizen of Delware; Manitowoc Engineering Company is a citizen of Wisconsin.

Plaintiff, Terry, filed this law suit alleging:

1. A Jones Act and General Maritime Law claim against his employer, Raymond;

2.A Louisiana tort claim for negligence against Manitowoc brought under diversity jurisdiction.

Raymond also filed a third-party claim against Manitowoc under Louisiana Tort Law. Raymond did *not* obtain judgment against Manitowoc. Manitowoc has objected to federal court jurisdiction over it at all stages of these proceedings.

Essentially, Terry has alleged that Raymond, as his employer, is responsible for his injuries under the Jones Act because, in spite of the fact that the accident occurred on a fixed platform, plaintiff was permanently assigned to one of his employer's vessels operating in the North Sea. Terry's general maritime claim against his employer was not sufficient to sustain jurisdiction as both the District Court and Appellate Court correctly found that because the accident occurred on a fixed platform, *Rodriguez*[1] prevented the application of general maritime law.

Terry's direct tort claim against Manitowoc was brought under diversity jurisdiction; however, diversity jurisdiction could not be established as to

1. *Rodriguez v. Aetna Casualty & Surety Co.*,395 U.S. 352, 366, 89 S.Ct. 1835, 1843, 23 L.Ed. 2d 360, 370, (1969); and cases cited at pp. 404-405 of the opinion of October 8, 1981 (658 F.2d 398).

Manitowoc because Manitowoc was not amenable to jurisdiction under the forum state's (Louisiana) Long Arm Statute.[2]

While it is not clear from the decision of the Appellate court whether or not Terry's federal case arose under the Jones Act or the general maritime law (despite their holding that general maritime law did not apply), the Fifth Circuit wrongfully applied the principles of *Lone Star*[3] in holding that Manitowoc was subject to diversity jurisdiction under a federal standard[4] solely because of the federal maritime claim validly asserted by plaintiff against his employer.

The holding in *Lone Star* allows Raymond, already a defendant subject to the jurisdiction of the court, to file any type of third-party claim against

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2. Manitowoc was not amenable to jurisdiction under the Louisiana Long Arm Statute which requires that for jurisdiction to be asserted over a non-resident, the cause of action must arise out of said defendant's activities in the State of Louisiana. See: LSA R.S. 13:3201(d) and R.S. 13:3202.

3. *Lone Star Package Car Co. v. Baltimore and O. R. Co.* (5th Cir. 1954) 212 F.2d 147.

4. Opinion of October 8, 1981 (658 F.2d 398 at 403 citing *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.CT. 154, 90 L.Ed. 95 (1945)

Manitowoc. However, Raymond did *not* obtain a judgment on its third-party complaint against Manitowoc. Rather, Terry, the original plaintiff, was allowed to recover directly against Manitowoc in a diversity claim based strictly on Louisiana Tort Law, even though diversity of jurisdiction could not be established as required under the forum state's Long Arm Statute.

Manitowoc challenges the jurisdiction of the federal court as to the state tort claim of Terry asserted directly against Manitowoc.

The District Court dismissed Manitowoc's objection to jurisdiction without written reasons. The Court of Appeals for the Fifth Circuit rendered an opinion on October 8, 1981 upholding jurisdiction as to Terry's state-created tort action against Manitowoc ". . . merely by virtue of Terry's Jones Act claim against Raymond. . . ." 658 F.2d 398 at 403 or "solely because of the federal maritime claim validly asserted against Raymond by its seaman-employee, Terry." 658 F.2d 398 at 404.

A Petition for Rehearing and for Rehearing En Banc was denied by the Fifth Circuit on January 6, 1982. On January 25, 1982, the Fifth Circuit ordered the mandate stayed pending the disposition of this

petition.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

### THE COURT OF APPEALS HAS UNCONSTITUTIONALLY EXPANDED THE MEANING OF THE "ARISING UNDER" CLAUSE OF ARTICLE III, SECTION 2, OF THE UNITED STATES CONSTITUTION BY SUSTAINING JURISDICTION OF A PLAINTIFF'S STATE TORT CLAIM FILED DIRECTLY AGAINST *ONE* DEFENDANT MERELY BECAUSE PLAINTIFF HAS ASSERTED A FEDERAL CLAIM AGAINST *ANOTHER* DEFENDANT.

The United States Constitution, Article III, Section 2, provides that the judicial power of the United States extends to cases "arising under" the Constitution of the United States . . . .; cases of admiralty and maritime jurisdiction, etc. The related statutory provision granting federal question jurisdiction uses the same "arising under" language. 28 USC Section 1331.

Terry's Jones Act claim against its employer, Raymond, was proper; Raymond, under *Lone Star*, had the right to file a third-party action against Manitowoc. However, the instant issue is whether or

not Terry could also maintain a diversity action based exclusively on state tort law directly against Manitowoc who is not amendable to jurisdiction under state law.

As correctly found by the Fifth Circuit its opinion in this matter:

> "In a diversity case, the amenability of a non-resident party is determined under a two-part test. First, the long arm statute of the forum state must assert jurisdiction of the defendant for the cause of action at issue in the suit. This question is governed by state law." (citations omitted) 658 F.2d 398 at 401.

The Long Arm Statute of the forum state does *not* permit the exercise of personal jurisdiction over a non-resident defendant unless plaintiff's cause of action arises from the non-resident's causing injury or damage in Louisiana R.S. 13:3201(d) and R.S. 13:3202. The case law of Louisiana upholds the Louisiana Statutory Provisions.[5]

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5. *Cambre v. St. Paul Fire & Marine Ins. Co.* (1 Cir. 1976) 331 So.2d 585; *Rush v. Matson Navigation Co.* (2 Cir. 1969) 221 So.2d 265. See also: *Saffrhan v. Buck Steber, Inc.*, (Ed. La. 1975) 413 F. Sup. 31; *Walker v. Newgent* (5 Cir. 1978) 583 F.2d 163.

The Fifth Circuit also specifically found that general maritime law does not apply to Mr. Terry's accident as it occurred on an offshore platform. Citing *Rodriguez v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 366, 89 S.Ct. 1835, 1843, 23 L.Ed. 2d 360, 370, 1969; *In Re: Dearborn Marine Service , Inc.* (5th Cir. 1974) 499 F.2d 263, 277; Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 268, 93 S.Ct. 493, 504, 34 L.Ed. 2d 454, 467 (1972).

Neverless, the Court concluded that Manitowoc was amenable to its jurisdiction under a federal standard[6] *solely because of the federal Jones Act claim validly asserted against Raymond by its* seaman employee, Terry. As to this key issue of jurisdiction, the Fifth Circuit held:

> "We recognize that Manitowoc's liability in this case arises only from Louisiana tort law. It may appear incongruous that Manitowoc becomes amenable to personal jurisdiction under a federal standard merely by virtue of Terry's Jones Act claim agianst Raymond when the only basis for Manitowoc's liability must arise under state law, but this is the precise holding in *Lone Star,* 658 F.2d 398 at p. 403.

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6. *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed 95, 101 (1945).

However, an examination of the *Lone Star* opinion reveals that it is not applicable to the factual situation presented in the present case. In *Lone Star,* the plaintiff brought an action against Lone Star based on diversity and under the Carmack Amendment to the Interstate Commerce Act.[7] Lone Star then filed a third-party complaint against B.N.O. Railroad for indemnity. The Fifth Circuit concluded that since the original claim against Lone Star originated under federal law (the Carmack Amendment) there was jurisdiction over Lone Star's third-party claim for *indemnity* against B.N.O. Accordingly, under *Lone Star* , Raymond, as the defendant in the Jones Act case, could assert a third-party indemnity complaint against Manitowoc in federal court. However, as noted above, Raymond did not recover on its third-party complaint for indemnity against Manitowoc and that is presently not at issue.

The issue in the present case is whether plaintiff, Terry, may join in one suit—his federal claim against Raymond with his purely state based diversity claim against an entirely different defendant, Manitowoc, in a forum where Manitowoc is not amenable to jurisdiction under state law.

The United States Supreme Court has previously recognized that federal courts do not have jurisdiction over a state law claim against a second defendant

7. 49 USC Sec. 20 (11).

such as Manitowoc when there is no independent basis for federal jurisdiction for such claim. In *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed. 276 (1976), the United States Supreme Court affirmed the Ninth Circuit's holding that the federal court had no power to exercise pendent jurisdiction over the state-law claims against an *additional party* over which party federal jurisdiction was otherwise nonexistent. At page 2420 of the opinion, Mr. Justice Rehnquist stated:

> "From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, *to join an entirely different defendant* on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant derive from a common nucleus of operative fact . . . But the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction

> marked out by Congress." (emphasis added)

Contrary to this principle enuniciated by the United States Supreme Court, the Fifth Circuit concluded that:

> "The Court below had personal jurisdiction over Manitowoc solely because of the federal maritime claim validly asserted against Ravmond by its seaman-emplyee, Terry." 658 F.2d 398 at p. 404.

Such a holding is not supported by *Lone Star* and is in direct conflict with the holding of this court in *Aldinger.*

The fact that Terry asserted a maritime claim against Raymond is not sufficient to establish independent jurisdiction of a non-federal claim against an *additional* party, Manitowoc, over whom there is no independent basis for federal jurisdiction.

## CONCLUSION

The decision below is erroneous in that it creates a significant expansion of federal court jurisdiction beyond the concept of federal courts of limited jurisdiction as set forth in the United States Constitution and by the United States Congress. Therefore, the present Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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# Appendix

Fred P. TERRY, Plaintiff-Appellee
Cross-Appellant,

v.

RAYMOND INTERNATIONAL, INC.,
Defendant-Appellee,

v.

MANITOWOC ENGINEERNG COMPANY,
Defendant-Appellant
Cross-Appellee.

No. 79-1227.

United States Court of Appeals,
Fifth Circuit,*
Unit A

October 8, 1981

Seaman brought Jones Act suit against his employer, an oil well rigging company, and a tort action against crane manufacturer to recover for injuries sustained while rigging a crane on an offshore drilling platform in the North Sea, in which employer filed third-party complaint against the manufacturer. The

United States District Court for the Eastern District Court for the Eastern District of Louisiana, Lansing L. Mitchell, Jr., rendered judgment on jury verdict for plaintiff, and appeal and cross appeal were taken. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) federal standard governed non-resident manufacturer's amenability to personal jurisdictional and since the manufacturer, a Wisconsin corporation, has minimum contacts with Louisiana it was amenable to personal jurisdiction in the Eastern District; (2) service of process on manufacturer's Louisiana maintenance employee was authorized under Louisiana law; (3) accidents on petroleum platforms are not under maritime jurisdiction; (4) district court correctly applied Louisiana law; (5) although jury found employer was responsible for 60% of the accident and that manufacturer was responsible for 40%, Louisiana law required a 50-50 apportionment of judgment; and (6) interest was to be paid as of date of judicial demand.

Affirmed in part, vacated in part, and remanded.

Appeals from the United States District Court for the Eastern Court for the Eastern District of Louisiana.

Before GOLDBERG, CHARLES CLARK and REAVLEY, Circuit Judges.

CHARLES CLARK, Circuit Judge:

This case arises from injuries suffered by Fred P. Terry during the installation of a crane on a petroleum production platform twenty-five miles off the coast of England. Manitowoc Engineering Company, the manufacturer of the crane, argues that the court below lacked personal jurisdiction over the company, that maritime law, not Louisiana law, should have determined the rights of the parties, and that the evidence did not support the jury's verdict. Terry cross appeals, arguing that the court below should have awarded him interest as of the date of judicial demand, as required by Louisiana law. We hold that the district court had personal jurisdiction over Manitowoc, that the court correctly apportioned liability under Louisiana law, and that there was ample evidence to support the jury's verdict. We vacate the trial court's verdict. We vacate the trial court's award of interest and hold that interest must be awarded as of the date of judicial demand.

I.

Terry was employed by Raymond International

as a seaman aboard the SARITA, a workship servicing offshore platforms in the North Sea. Raymond, a "rigging" company with expertise in the construction of offshore platforms, was under contract with Phillips Petroleum Company to convert a Phillips drilling platform to a production platform. Terry and the SARITA were assigned to this project, which required, *inter alia*, the installation of two manitowoc Seacrane 70 cranes. The cranes were purchased by Phillips from A. Long, a British company which dealt in Manitowoc products. Manitowoc sponsored training programs in which A. Long personnel were trained in the service and use of Manitowoc products, Jack Bierne, an A. Long employee who had attended such programs, was sent to the platform to supervise the erection of the cranes. When Beirne arrived on the platform, however, Raymond personnel already had set the cab of the crane on its pedestal. As a result, Beirne was faced with the problem of mounting a 13-ton counterweight on the cab of the crane while the cab was fixed some 20 feet above the deck of the platform.

Under a plan devised by Raymond personnel and known to Beirne, Raymond attempted to mount the counterweight by hoisting it on cables attached to an A-frame gantry which projected from the roof of the cab directly above the location of the

counterweight. This method of mounting the counterweight was approved by Manitowoc for a land-based Manitowoc crane, but it waws not approved for the Seacrane 70. Some ten minutes after the hoisting operation began, the A-fram gantry collapsed crushing Terry.

Terry brought suit against Raymond and Manitowoc in the United States District Court for the Eastern District Court of Louisiana. The complaint alleged both diversity and admiralty jurisdiction. Manitowoc, a Wisconsin corporation with no agent for service of process in Louisiana, was served by letter to its Wisconsin headquarters. Raymond filed a third-party complaint against Manitowoc, arguing that Manitowoc was liable to Raymond for any sums owed by jRaymond to Terry. Service then was made on Elmer nagel, Manitowoc's sole employee in Louisiana. Nagel ws a mantenance employee who serviced Manitowoc cranse used in the Louisiana area. Manitowoc made a timely objection to the personal jurisdiction of the cort, but the district court denied the company's motion to dismiss.

The primary issue at trial was whether Ralymond or manitowoc was responsible for the accident. Raylmond argued that the Seacrane 70 was defectively designed and that manitowoc was negligent in fail-

ing to warn users that the A-frame gantry could not be used to mount the co;nterweight. Raymond's witnesses testified that erection of the crane presented an engineering problem wiht no satisfactory solution, and that minor design modivications would have enabled the gantry to support the counter weight. They also suggested that manitowox's training program for A. Long employees should have alerted the trainees to the danger of using the gantry to hoist the counterweight. According to Manitowoc, however, Raymond's misues of the Seacrane 70 was the sole casue of the accident. Manitowoc argued that the gantry was not designed to suppport the cou;nterweight, and that Raymond should have known that using the gantry as a purchase for hoisting the counterweight into place was unreasonably dangerous. A jury found taht Raymond was sixty percnet responsible. It was awarded Terry a total recovery of 1.5 million dollars. Raymond chose not to appjeal and settled with Terry for 750,000 dollars.

II.

[1] Our analysis of personal jurisdiction is based on a combination of two elements, amenability to jurisdiction and service of process. By amenability we refer to the substantive reach of a forum's jurisdic-

tion. Service of process is the physicial means by which jurisdiction is asserted. These elements are related but sidtinct. Both service and amendability must be present to authorize a district court to adjudicate the rights of the parties. Because amenability has both a state law and federal constitutional significance, personal jurisdiction of the district court over Manitowoc must be determined by the use of three tsts: (1) assertion of jurisdiction by the law of the forum (2) conformity of the law with the Constitution, and (3) autority for the meanse of service of process. U:nder the Federal Rules of Civil Procedure, either federal or state methods of service are authorized. *See* Fed.R.Civ. P. 4. If the law of the forum does not authorize the means by which service on a party has been accomplished, the court laxks personal jurisdiction over the party even though the party is amenable to the court's jurisdiction.

[2] In a diversity case, the amenability of a nonresident party is determined under a two-part test. First, the long arm statute of the forum state must assert jurisdiction over the defendant for the casue of action at issue in the suit. This question is governed by state law. *E.g., Standard Fittings Co. v. Sapag, S. A.*, F. 2d 630, 636 (5th Cir. 1980); *Jetco Electronic Industries, Inc. v. Gardiner,* 473 F.2d 1228, 1232 (5th Cir. 1973). Second, the exercise of personal jurisdic-

tion over the defendant must be consistent with the due process clause of the fourteenth amendment. This inquiry proceeds under federal law, and consists of deciding whether the defendant has minimum contacts with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 u.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 101 (1945); *see also Product Promotions, Inc. v. cousteau*, 495 F.2d 483, 489 (5th Cir. 1974).

The contoursof amendability in non-diversity cases are more fluid. Federal statutes have effect throughout the United States, and thus assertrion of "federal long arm jurisdiction" arises only in the context of jurisdiction over nonresident aliens or the extraterritorial assertion of American law. *Cf. Continental ore Col v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-05, 82 S.Ct. 1404, 1413, 8 L.Ed.2d 777, 787 )1962); *American Bananna Co. v. United Fruit Co*, 213 U.S. 347, 355-56, 29 S.Ct. 511, 512, 53 L.Ed. 826, 831-832(1909). Some commentators have suggested that the due process clause of the fifth amendment imposes upon the personal jurisdiction of the federal court restrictions similar to those imposed on stte courts under the fourteenth amendment. *See* Foster, *Long Arm Jurisdiction in Federal Courts*, 1969

Wis.L.Rev. 9, 36 (1969). As this court has observed, "[a]lthough the propriety of service issuing from a federal court need not necessarily be tested by the same yardstick as is the constitutional limitation upon service of process a helpful and often used guideline." *Time, Inc. v. Manning,* 366 F.2d 690, 694 (5th Cir. 1966). Strict federal venue requirements, however, have amde it unnecessary to develop a judicial doctrine of the limits of jpersonal jurisdiction in federal cases. Thus, as a practical matter, the most significant restraint on the personal jurisdiction of dederal courts in federal cases is service of process, the third part of the three-part test.

[3] It is settled that Congress may provide for nationwide service of process if it chooses to do so. *See Robertson v. Railroad Labor Board,* 268 U.S. 619, 622, 45 S.Ct. 621, 622, 69 L.Ed. 1119, 1121 (1925). In fact, Congress has permitted nationwide service in several specialized statutes. *See, e.g.,* 28 U.S.C § 2361 (1978) (interpleader); 15 U.S.C. §§ 5, 22, 25 (1973) (federal antitrust laws); 15 U.S.C. § 77v(a) 1971) (federal securities laws). However, Congress has not authorized general process form the district courts to run throughout the nation. Under Rule 4, federal process can be served outside the state in which the district court sits only under an explicit provision in a

federal statute, under state procedures, or under the provisions for 100-mile "bulge" service.

III.

Manitowoc argues that the federal district court in the Eastern District of Louisiana lacked personal jurisdiction over the company on any cause of action asserted by Terry or Raymond. It does not contend that its contacts with Louisiana are inadequate to meet the fairness test under *International Shoe* and its progeny. Instead, Manitowoc argues that the Louisiana long arm statute does not assert jurisdiction over it because Terry's cause of action does not arise out of Manitowoc's activities in Louisiana. Manitowoc phrases its argument in terms of service of process, but it is clear that the company's real objection if that it is not amenable to jurisdiction under the Louisiana long arm law, and that the second element of the three-part test is missing.

Terry's lawsuit in the court below consisted of three primary claims. Terry's claim against Manitowoc charged that Manitowoc's crane was defective and that Manitowoc had been negligent. This is a tort claim brought under diversity jurisdiction. Raymond's third party complaint against Manitowoc also was based strictly on a tort theory.

Terry's claim against Raymond, however, was brought under the Jones Act and general maritime law. This cause of action, ofcourse, is a federal claim. Thus, although Manitowoc's liability arises exclusively from Louisiana tort law, the case was brought under both diversity and federal case jurisdiction.

[4,5] In a case brough under both diversity and federal case jurisdiction, the defendant's amenability to process under state law, which could be critical in a pure diversity based action, is irrelevant. In *Lone Star package Car Co. v. Baltimore and O.R. Co.*, 212 F.2d 147, 155 (5th Cir. 1954), we held that a federal, not a state, standard governs amenability to personal jurisdiction where the case arises under both diversity and federal question jurisdiction. In *Lone Star,* the B & O Railroad was served with a third party complaint based on diversity jurisdiction and on the Carmack Amendment, a federal statute. The court acknowledged that, under the traditional two-step approach, amenability would be measured first under the Constitution. According to the court, however, "[t]he indicated approach seems to us basically erroneous where the power of the federal court is invoked not solely on the ground of diversity of citizenship, but can be independently sustained, as in this cse, on the ground that the matter in controversy arises under the Constitution, laws or treaties of the United

States." 212 F.2d at 153 - 54. In such cases, according to the court, the amenability of the parties was to be measured under "basic principles of fairness," the fedral standard adopted in *International Shoe*. *Id.* at 155. Here, it is evident that Manitowoc was minimum contacts under the *International Shoe* test. Thus, *Lone Star* forecloses Manitowoc's argument that it is not amendable to personal jurisdiction in the EAstern District of Louisiana.

We recognize that Manitowoc's liability in this case arises only from Louisiana tort law. it may appear incongruous that manitowoc becomes amenable to personal jurisdiction under a federal standard merely by virtue of Terry's Jones Act claim against Raymond when the only basis for manitowoc's liability must arise under state law, but htis is the precise holding of *Lone Star*. That case involved a third pjarty complaint and derivative liability under state contract law, *see* 212 F.2d at 152. *Lone Star* mandates our conclusions here that federal law determines whether Manitowoc is amenable, and that Manitowoc is amenable under federal law.

The only remaining inquiry under the three-part test for personal jurisdiction is whether there was proper seravice of process on manitowoc. Under rule 4(d)(3) of the Federal Rules of Civil Procedure, service

on a corporation may be accomplished by delivering copies of te summons and complaint to "a managing or general agent." The parties have devoted most of their attention to whether service on Elmer Nagel was adequate service under this provision. Raymond notes that the *Lone Star* case itself held that "[i]f a corporation's businessis so substantial as to render the corporation amenable to suit in the state, its principal agent in charge of activities within that state meets test of a 'managing agent.' " 212 F.2d at 152. Because Nagel was manitowoc's only employee in Louisiana at the time of the suit, Raymond contends that he clearly was "in charge of activities within that state," and thus is a "managing agent" under *Lone Star.*

Although the language of the *Lone Star* test for a managing agent seems to extend to Nagel, it is not clear that the rationale behind the language is applicable. Nagel was the lone Manitowoc employee in Louisiana, but most of Manitowoc's business in Louisiana was conducted from the company's Houston office. Thus, Nagel was no;t in charge of the activities which gave rise to Maniotwoc's amenablility in the state. Moreover, it is not clear that Nagel exercised the supervsory functions required for "managing agent" status under rule 4(d)(3). For these reasons, we

expess no view as to whetherNagel was a "managing agent" within the meaning of Rule 4(d)(3).

[6] Under rule 4(d)(7), the plaintiff also may serve the defendant "in the manner prescribed by law ofthe state in which the district court is held." Article 1261(2) of the Louisiana Code of Civil Procedure permits service on a corporation "[b]y personal service on any employee of suitable age and discretion." Nagel is such an employee and we hold that service on Nagel was proper under this provision. Although Manitowoc renews its argument that Louisiana law limits the state's long arm jurisdiction to causes of action arising from contacts with the state, this objection is beside the point. The company's amenability to process is estalished under the federal standard of *International Shoe*. Federal law eliminatese any need to determine whether Manitowoc was amenable under the Louisiana long arm statute. The only component of personal jurisdiction we must test is service of process. Here, service was accomplished under Rule 4(d)(7), "in the manner prescribed by state law." Because manitowoc was amenable to service in Louisiana under the federal standard of amenability, and because service was proper under Rule 4(d)(7), Manitowox was brought within the personal jurisdiction of the district court in this action.

IV.

[7] Manitowoc also challenges the jury's verdict tht the company was responsible for Terry's injuries. Manitowoc argues that the A-frame gantry was not designed to support the counterweight, and that this fact was apparent to Raymond, a sophisticated "rigger" of offshore platforms. In manitowox's view, a warning would have been futile to prevent such willful misuse of the Seacrane 70, and thus Raymond's negligence as the sole cause of the accident.

Manitowoc's argument is a strong one but the jury was not persuaded. It found atht eh company was negligent, tht the Secrane 70 was defective and in normal use at the time of the accident, and that Manitowoc was forty percent responsible for Terrys injuries. The standard for appellate review of a jury's finding is clear and exacting. No matter how persuasive we might find Manitowoc's argument, this court is not at liberty to set the jury's verdict aside if that verdict could have been reached by reasonable men in the exercise of impartial judgment. *See Williams v. Insurance Co. of North America*, 634 F.2d 813, 815 (5th Cir. 1981); *boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

[8] The record demonstrates that the jury verdit

cannot be disturbed. There was testimon that Beirne, the A. Long employee sent to supervise the erection of the crane, has attended maniowoc training sessions on several occasions but never was warned tht the readily accessible gantry on this model of its cranes could not be used to mount the counterweight. The jury reasonably could have concluded from this testimony that, having undertaken to train Beirne, Manitowoc ws negligent in failing to warn him of such a significant danger, and that Beirne, in his superior capacity, would have protested that Raymond's plan was unsafe. Witnesses also testified that inexpensive extensjions of the webbing in the gantry would have permitted the structure to support the counterweight and that field assembly of the Seacrane 70 presented a problem to which there was no satisficatory solution. This proof provided an ample basis for the jury's finding that the Seacrane 70 was defective and in normal use at the time of the accident. The jury's finding that Manitowoc was forty percent responsible for Terry's injuries must be affirmed.

[9,10] Manitowoc also contends that the jury's award of damages wa excessive. This court may not reject a jury's determination of damages unless the verdict "is so gross as to be contrary to right reason." *Hatfield v. Anthony Forest Products Co.*, 642 F.2d 175, 178 (5th Cir. 1981). Here, there was testimony

that Terry's lost earnings exceeded $600,000. Moreover, the evidence showed tht Terry's injuries were severe and that his legs are permanently disabled. While the jury's award was magnanimous, we cnnot say it was contrary to right reason. Accordingly, we affirm the jury's award of damages.

V.

The jury found that Raymond was responsible for sixty percent of the accident and that Manitowoc as responsible for forty percent. the trial court applied Louisiana law, however, and held that each defendant was liabl for fifty percent of the judgment. manitowoc argues that federal maritime law should have determined the liability of the parties, and that federal law would have required implementation of the jury's apportionment of liability.

[11,12] Manitowoc's argument is appealing especially in view of our conclusion that the court below had personal jurisdiction over Manitowoc solely because of the federal maritime claim validly asserted against Raymond by its seaman-employee, Terry. Nevertheless, the cases make clear that federal maritime law does not make clear that federal maritime law does not apply to accidents which occur on offshore petroleum platforms. In *Rodrigue v. Aet-*

*na Casualty and Surety Co.*, 395 U.S. 352, 366, 89 S.Ct. 1835, 1843, 23 L.Ed.2d 360, 370 (1969), the Supreme Court held that offsore, petroleum platforms were artificial islands, andthat accidents occurring on these islands were not within federal admiralty jurisdiction. It is true, as Manitowoc points out, the Rodrigue was based in part on the principle that offshore platforms on the Outer Continental Shelf of the United States Lands Act [Lands Act], 43 U.S.C. & 1333 et seq., and that adjacent state law applied under section 4 of the Act, 43 U.S.C. & 1333. See 395 U.S. at 355, 89 S.Ct. at 1837, 23 L.Ed.2d at 364. The important part of the Rodrigue holding for present purposes, however, is that accidents on offshore platforms, wherever they are located are not within maritime jurisdiction as defined in the Death on the High Seas Act, 46 U.S.C & 761 et seq. See id. at 366, 89 S.Ct. at 1842, 23 L.Ed.2nd at 370. As we observed in In re Dearborn Marine Service, IKnc., 499 F.2d 263, 272 [5th Cir. 1974], Rodrigue made clear that "under traditional jurisdiction principles, maritime law is inapplicable to platform-based accidents." The rationale for this rule, according to the Dearborn court, is that island-platforms are to be viewed as extensions of the sub-soil unless they are erected as navigational aids. See id. at 272 n.18. Thus, even if Manitowoc is correct in its assertion that the Lands Act does not automatically incorporate Louisiana law as the law

governing an offshore platform inn the North Sea, Rodrigue nevertheless makes clear that federal maritime law also is in applicable.

Recent developments in admiralty law confirm that an accident on an offshore petroleum platform is not subject to federal maritime law. In Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 268, 93 S.Ct. 493, 504, 34 L.Ed.2d 454, 467 [1972], the Supreme Court held that airplane accidents are not within federal admiralty jurisdiction unless the accident bears a significant relationship to traditional maritime activities. Executive Jet evinces a general inclination to measure the scope of admiralty jurisdiction by reference to the nature of the activities involved in a particular case instead of relying exclusively on the traditional locality test. The same inclination has been expressed in this circuit. See In re Dearborn Marine Service, Inc., supra, 499 F2d at 274-76. Terry's accident occurred on a petroleum platform during activities having little to do with traditional maritime activities. Rodrigue clearly established that accidents on petroleum platforms are not under maritime jurisdiction. See 395 U.S. at 366, 89 S.Ct. at 1842, 23 L.Ed.2nd at 370. Accordingly, we hold that federal maritime jurisdiction. See 395 U.S. at 366, 89 S.Ct. at 1842, 23 L.Ed.2d at 370. Accordingly, we

hold that federal maritime law does not apply to Terry's accident.

Our holding that maritime law does not apply to Manitowoc's case leaves unanswered the question what law does apply. The parties and the district court assumed, however, that Louisiana law is applicable if maritime law is not. We see no reason to disagree with this assumption. After Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 188 [1938], diversity tort cases brought in federal court are to be tried under state law. Here, Manitowoc's liability was based exclusiely on tort law, even though the court's personal jurisdiction over Manitowoc exists by virtue of Terry's maritime claim against Raymond. Thus, we hold that the district court correctly applied Louisiana law.

Our decision that Louisiana law applies disposes of the remaining two issues in this appeal. Under Louisiana law, joint tortfeasors are liable in solido for their virile shares of the damages awarded the plaintiff. See La.Civ. Code art. 2103; Shaw v. New York Fire & Marine Underwriters, Inc., 252 La. 653, 655, 212 So.2d 700, 705-06 (1969). For this reason, the trial court held that Manitowoc and Raymond each were liable for fifty percent of the judgment awarded to Terry. Manitowoc does not deny that Louisiana

law requires the 50-50 apportionment of the judgment, and we affirm the trial court's ruling.

Louisiana law also provides that intereest in tort cases shall run from the date of filing the complaint. La.Rev. Stat. § 13:4203. The trial judge awarded interest as of the date of judgment. Because state law applies, however, interest should be paid as of the date of judicial demand. See Canoa v. Travelers Insurance Co., 406 F.2d 410, 411 (5th Cir. 1969); New Amsterdam Casualty Co. v. Soileau, 167 F.2d 767, 772 (5th Cir. 1948).

Manitowoc is subject to the personal jurisdiction of the court below because it was amendable to service of process under the federal minimum contacts standard and was served with process under Louisiana procedures as permitted by Rule 4(d)(7). The jury's verdict and award of damages could have been reached by reasonable jurors acting impartially, and they are affirmed. Because Terry's accident occurred on an offshore platform in the North Sea, Louisiana law rather than maritime law properly was used to determine Manitowoc's liability. Under Louisiana law, Manitowoc is liable in solido with Raymond for the tort damages awarded to Terry, and is liable for fifty percent of the judgment. The trial court erred,

however, in awarding interest as of the date of judgment. Interest should be awarded s of the date of the judicial demand as required by Louisiana law. The judgment is

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

# APPENDIX B

## IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

UNIT A

No. 79-1227

Filed: Jan. 6, 1982

FRED P. TERRY,

Plaintiff-Appellee-
Cross Appellant

RAYMOND INTERNATIONAL, INC.

Defendant-Appellee,

versus

MANITOWOC ENGINEERING COMPANY,

Defendant-Appellant-
Cross-Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452- October 14, 1980.

## ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 8, 1981, 5 Cir., 1981, 658 F.2d 398).

Before GOLDBERG, CHARLES CLARK, and REAVLEY, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Fedreal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/S/ CHARLES CLARK
United States Circuit Judge

# APPENDIX C

## UNITED STATES DISTRICT COURT
## EASTERN DISTRICT OF LOUISIANA
## NEW ORLEANS DIVISION

| | | |
|---|---|---|
| FRED P. TERRY | * | CIVIL ACTION |
| VERSUS | * | NO. 77-146 |
| RAYMOND INTERNATIONAL, INC., RAYMOND INTERNATIONAL OF DELAWARE, INC. and MANITOWOC ENGINEERING COMPANY OF MANITOWOC, WISCONSIN | * | SECTION "F" |

## JUDGMENT

This action came on for trial before a Court and a Jury, Honorable lansing L. Mitchell, District Judge, presiding, and the Court having instructed the Jury to find a general verdict and also to make answer to certain interrogatories, and the jury having duly rendered a verdict and having made answer to said interrogatories;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the Plaintiff, FRED P. TERRY, and against the Defendants, RAYMOND INTERNTIONAL, INC., RAYMOND INTERNATIONAL OF DELAWARE,

INC. and MANITOWOC ENGINEERING COMPANY OF MANITOWOC, WISCONSIN, in solido, in the sum of ONE MILLION FIVE HUNDRED THOUSAND AND NO/100 ($1,500,000.00) DOLLARS, with interest thereon at the rate of Seven (7%) Percent per annum, as provided by law, and costs;

IT IS FURTHER ORDERED ADJUDGED AND DECREED that there be contribution between the Defendants, RAYMOND INTERNATIONAL, INC., RAYMOND INTERNATIONAL OF DELAWARE, INC. and MANITOWOC ENGINEERING COMPANY OF MANITOWOC, WISCONSIN, in proportion to the percentage of fault, which fault has been decided by their jury to be Sixty (60%) Percent attributable to RAYMOND INTERNATIONAL, INC. and RAYMOND INTERNATIONAL OF DELAWARE, INC. and Forty (40%) Percent attributable to MANITOWOC ENGINEERING COMPANY OF MANITOWOC, WISCONSIN;

IT IF FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the Defendant and Third-Party Plaintiff, RAYMOND INTERNATIONAL, INC. and RAYMOND INTERNATIONAL OF DELAWARE, INC., and against MANITOWOC ENGINEERING COMPANY OF MANITOWOC, WISCONSIN for con-

tribution for past maintenance and cure in the amount of and for all future maintenance and cure.

New Orleans, Louisiana, this 4 day of December, 1978.

U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed Jan. 5, 1979

| | | |
|---|---|---|
| FRED P. TERRY | * | CIVIL ACTION |
| VERSUS | * | NO.77-146 |
| RAYMOND INTERNATIONAL, INC., ET AL. | * | SECTION "F" MAGISTRATE 2 |

AMENDED JUDGMENT

This action came on for trial before a Court and a Jury, Honorable Lansing L. Mitchell, District Judge, presiding, and the Court having instructed the Jury to find a general verdict and also to make answer to certain interrogatories, and the jury having duly rendered a verdict and having made answer to said interrogatories:

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of the Plaintiff, FRED P. TERRY, and against the Defendants, RAYMOND INTERNATIONAL, INC.,

RAYMOND INTERNATINAL OF DELWARE, INC. and MANITOWOC ENGINEERING COMPANY OF MANITOWOC, WAISCONSIN, in the sum of ONE MILLION FIVE HUNDRED THOUSAND AND NO/100 DOLLARS ($1,500,000.00), with interest thereon at the rate of Seven Percent (7%) per annum, from the date of the judgment and costs; and

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be contribution between the defendants, RAYMOND INTERNATIONAL, INC. and RAYMOND INTERNATIONAL OF DELWARE, INC., as a single entity, and MANITOWOC ENGINEERING COMPANY OF MANITOWOC, WISCONSIN, for their virile portions of said judgment, which virile portions amount to Fifty Percent (50%) attributable to RAYMOND INTERNATIONAL, INC. AND RAYMOND INTERNATIONAL OF DELAWARE, INC., and Fifty percent (50%) attributable to MANITOWOC ENGINEERING COMPANY OF MANITOWOC, WISCONSIN; and

IT IF FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of Defendants, RAYMOND INTERNATIONAL, INC. and RAYMOND INTERNATIONAL OF DELAWARE, INC. against MANITOWOC ENGINEERING COMPANY for contribution of Fif-

ty Percent (50%) of the amounts expended by RAYMOND for maintenance and cure, which amount presently totals THRITY SIX THOUSAND TWO HUNDRED SEVENTY-ONE AND 05/100 DOLLARS ($36,271.05), and for contribution to a like extent fo all future maintenance and cure expenses incurred by RAYMOND on behalf of plaintiff.

New Orleans, Louisiana, this 4th day of January, 1979.

/S/ LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

# APPENDIX D

## UNITED STATES DISTRICT COURT
## EASTERN DISTRICT OF LOUISIANA

FRED P. TERRY — CIVIL ACTION
VERSUS — NO. 77-146
RAYMOND INTERNATIONAL, INC., RAYMOND INTERNATIONAL OF DELAWARE, and MANITOWOC ENGINEERING COMPANY — SECTION "F"

## INTERROGATORIES PROPOUNDED TO THE JURY

1. Were the defendants, Raymond International Inc. and Raymond International of Delware, through its employees, representatives, and/or agents negligent?

   Please answer Yes or No. Yes✓ No___

   If your answer to Question No. 1 is Yes, please answer Question No.2. If your answer to Question No. 1 is No, pleas answer Question No. 3.

2. Did the negligence of the defendants, Raymond International, Inc., and Raymond International of Delaware, play any part, no matter how slight, in producing plaintiff Fred Terry's injuries?

   Please answer Yes or No. Yes✓ No___

   Please answer Question No. 3.

3. Was the defendant Manitowoc Engineering Company negligent?

   Please answer Yes or No. Yes✓ No___

If your answer to Question No. 3 is Yes, please answer Question No. 4. If your answer to Question No. 3 is No, please answer Question No.5

4. Was the negligence of the defendant Manitowoc a proximate cause of the plaintiff's injuries?

Please answer Yes or No. Yes✓ No___

Please answer Question No. 5.

5. Was the Seacrane 70 manufactured by the defendant Manitowoc Engineering Company in normal or forseeable use at the time of its failure?

Please answer Yes or No. Yes✓ No___

If your answer to Question No. 5 is Yes, please answer Question No.6. If your answer to Question No. 5 is No, and your answer to Question No. 2 is Yes *and/or* your answer to Question No. 4 is No, do not answer the remaining questions.

6. Was the Seacrane 70 manufactured by the defendant Manitowoc Engineering Company defective so as to be unreasonably dangerous for normal or foreseeable use at the time of its failure?

Please answer Yes or No. Yes✓ No___

If your answer to Question No.6 is Yes, please answer No.7. If your answer to Question No. 6 is No, but your answer to Question No. 2 *and/or* Question No. 4 is Yes Please answer Question No. 8. If your answer to Question No. 2 *and*

Question No. 4 is no, do not answer the remaining questions.

7. Was the defective condition of the Seacrane 70 a proximate cause of plaintiff's injury?

Please answer Yes or No. Yes ✓ No ___

I you answered Yes to either Question Nos. 2 *and/or* 4 *and/or* 7, that is if you found that one or more of the defendants was at fault for plaintiff's injuries, please answer Question No.8

8. What amount, if any, will fairly and adequately compensate the plaintiff, Fred P. Terry for the injuries he sustained?

$1,500,000

Please read the following directions.

If you found only one defendant to be responsible for the plaintiff's injuries, do not answer the remaining questions.
If you have found that both defendants Raymond International a Manitowoc Engineering Company were at fault and that their fault was the proximate cause of the plaintiff's injuries, then you must apportion their fault by giving a percentage figure, showing the extent of negligence of each defendant. The combined total of the percentages determined by you must equal 100%

9. To what extent, expressed in percentages, did the defendants Raymond International, Inc. and Raymond International of Delaware's fault, which you are to consider as one entity, contribute to the plaintiff's injuries?

60%

10. To what extent, expressed in percentages, did the defendant, Manitowoc Engineering Company's fault contribute to the plaintiff's injuries?

40%

New Orleans, Louisiana this
4th day of December, 1978

/S/ MRS. MARY W. HIGGINS
FORELADY

# APPENDIX E

## IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT* UNIT A

No. 79-1227

Filed: Jan. 25th, 1982

FRED P. TERRY,

Plaintiff-Appellee-
Cross Appellant,

versus

RAYMOND INTERNATIONAL, INC.,

Defendant-Appellee,

versus

MANITOWOC ENGINEERING COMPANY,

Defendant-Appellant-
Cross Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452 October 14, 1980.

ORDER:

The motion of Appellant, Manitowoc Engineering Company, for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including February 26, 1982, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this court within that time. This stay is conditioned on the filing with the Clerk of this court, within 20 days of the date of this order, a bond for the payment of the judgment plus interest and costs with a solvent corporate surety in an amount equal to 125% of the total of said judgment interest and costs now due, conditioned as provided by law.

/S/ Illegible

UNITED STATES CIRCUIT JUDGE

# Opposition

NO. 81-1566

Supreme Court, U.S.
FILED
MAR 22 1982
ALEXANDER L. STEVAS
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1981

MANITOWOC ENGINEERING COMPANY

Petitioner

VERSUS

FRED P. TERRY

Respondent

VERSUS

RAYMOND INTERNATIONAL, INC.

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

# BRIEF FOR RESPONDENTS, FRED P. TERRY, RAYMOND INTERNATIONAL, INC. AND RAYMOND INTERNATIONAL OF DELAWARE, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## LIST OF ALL PARTIES

1. Manitowoc Engineering Company
2. Fred P. Terry
3. Raymond International, Inc.
4. Raymond International of Delaware, Inc.

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No. 81-1566

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MANITOWOC ENGINEERING COMPANY
Petitioner

VERSUS

FRED P. TERRY
Respondent

VERSUS

RAYMOND INTERNATIONAL, INC.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

# BRIEF FOR RESPONDENTS, FRED P. TERRY, RAYMOND INTERNATIONAL, INC. AND RAYMOND INTERNATIONAL OF DELAWARE, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

## STATUTE AND RULE INVOLVED

Article 1261 of the Louisiana Code of Civil Procedure provides:

> Service of citation or other process on a domestic or foreign corporation is made by personal service on any one of its agents for service of process.
>
> If the corporation has failed to designate an agent for service of process, or if there is not registered agent by reason of death, resignation, or removal, service of citation or other process may be at any place where the business of the corporation is regularly conducted either:
>
> (1) By personal service on any officer, director, or resident agent named in the articles of incorporation or in the last report previously filed with the secretary of state, or
>
> (2) By personal service on any employee of suitable age and discretion.

Rule 4(d) of the Federal Rules of Civil Procedure provides, in pertinent part:

> (d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> . . .
>
> (3) Upon a domestic or foreign cor-

poration or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

. . .

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

## STATEMENT OF THE CASE

The material facts and the course of proceedings below are accurately set forth in Part I of the lower court's opinion, which is attached to the petition for a writ of certiorari.

Fred Terry, a Louisiana citizen, filed suit in federal district court against Manitowoc Engineering

Company and Raymond International, Inc. Terry invoked federal subject matter jurisdiction on the basis of the Jones Act, admiralty, and diversity of citizenship. Terry subsequently amended his complaint to add Raymond International of Delaware, Inc. (Delray), a subsidiary of Raymond International, Inc., as a defendant. Delray and Raymond International have been regarded as a single entity throughout these proceedings, and they are collectively referred to herein as "Raymond."[1]

This action arises from an accident on a stationary petroleum production platform in the North Sea. The lower court correctly held that Terry's claim did not arise under federal admiralty jurisdiction. There has been no dispute, however, that Terry properly invoked federal jurisdiction against Raymond under the Jones Act and diversity of citizenship. Similarily, there has been no dispute that the sole possible federal subject matter jurisdiction for Terry's claim against Manitowoc was diversity of citizenship.

In addition to the claims asserted by Terry against Manitowoc and Raymond, Raymond filed a

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1. In its petition for certiorari, Manitowoc incorrectly states that Raymond International, Inc., is a citizen of Delaware. There is no question, however, that all defendants are citizens of states other than the State of Louisiana.

cross-claim and a third party complaint against Manitowoc for indemnity or contribution. The marshal served these pleadings, together with a summons, on one of Manitowoc's employees, Elmer Nagel, at Manitowoc's place of business in Slidell, Louisiana.

Following a nine-day trial, the trial court entered judgment on the jury's verdict in favor of Terry against Manitowoc and Raymond. The judgment, as amended, further awarded contribution between Raymond and Manitowoc on a 50-50 basis, not only with respect to the damages found by the jury, but also as to maintenance and cure express incurred by Raymond on Terry's behalf. The statement by Manitowoc in its petition for certiorari that Raymond did not obtain judgment against Manitowoc is simply incorrect.

In its responsive pleadings filed with the trial court, Manitowoc asserted a defense of lack of jurisdiction over the person, but did not assert the defenses of insufficiency of process or insufficiency of service of process. Manitowoc did not assert the defense of lack of jurisdiction over the subject matter at any stage of the proceedings prior to filing the present petition for certiorari.

Pre-trial discovery in this case disclosed that

Manitowoc's activities within the State of Louisiana have been substantial for many years. Manitowoc has not contended that its activities in Louisiana were insufficient to meet the constitutional tests of fundamental fairness and fair play that must be met before it could be subjected to personal jurisdiction within the state. Instead, Manitowoc has contended only that since the claims against it do not arise from Manitowoc's activities in Louisiana, the method by which Manitowoc was served with process in this case was impermissible under the applicable federal rule and state statutes.

## SUMMARY OF ARGUMENT

The claims by Terry and Raymond against Manitowoc arise within federal courts' subject matter jurisdiction. The precise questions presented for review by Manitowoc in its petition for certiorari confuse the clear distinctions between subject matter jurisdiction and personal jurisdiction.

The only jurisdictional issue that the court below decided was that Manitowoc was amenable to personal jurisdiction in Louisiana and was properly served with process in this case. This Court's decision in *Aldinger v. Howard*,[2] dealt only with questions per-

2. 427 U.S. 1, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976).

taining to federal subject matter jurisdiction. Accordingly, Manitowoc is incorrect in suggesting that the decision below may be inconsistent with *Aldinger*.

The Court of Appeals properly affirmed the trial court's decision that it had personal jurisdiction over Manitowoc. Manitowoc's activities within Louisiana are more than sufficient to satisfy the constitutional standards for the assertion of personal jurisdiction. Moreover, Manitowoc was properly served with process through its employee and representative in Louisiana, Elmer Nagel, pursuant to Rule 4(d) (7) of the Federal Rules of Civil Procedure and Article 1261(2) of the Louisiana Code of Civil Procedure.

## ARGUMENT

In its petition for certiorari, Manitowoc freely acknowledged that Terry's claim against Raymond and Raymond's third party action against Manitowoc fell within the scope of the subject matter jurisdiction of the federal courts. Manitowoc framed the issue in its petition as "whether or not Terry could also maintain a diversity action based exclusively on state tort law directly against Manitowoc who is not amenable to jurisdiction under state law."[3]

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3. Petition for Certiorari at 8-9.

Thus stated, the issue presented by Manitowoc amounts to an improper intermingling of principles of subject matter jurisdiction and jurisdiction over the person. Indeed, the sole jurisdictional question presented to the lower court was whether a federal court sitting in the State of Louisiana properly could exercise personal jurisdiction over Manitowoc under the facts of this case. The lower court correctly concluded that such an exercise of jurisdiction in this case was proper.

In its petition for certiorari, Manitowoc apparently suggests that Article 3, Section 2 of the Constitution precludes a federal court sitting in Louisiana from asserting personal jurisdiction over Manitowoc, even though Terry and Manitowoc are citizens of different states. Manitowoc argues that the lower court's decision is inconsistent with this Court's decision in *Aldinger v. Howard.*[4]

Article 3, Section 2 of the Constitution deals only with the federal courts' subject matter jurisdiction. The judicial power thus conferred by the Constitution extends to all cases between citizens of different states. Congress has vested the district courts with

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4. 427 U.S. 1, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976).

jurisdiction over such cases, provided the amount in controversary exceeds the sum of $10,000, exclusive of interest and costs.[5]

The *Aldinger* decision stands only for the proposition that in the federal courts, a plaintiff who has asserted a claim against one defendant with respect to which there is federal subject matter jurisdiction may not join an entirely different defendant on the basis of a state-law claim over which there is no independent basis for federal subject matter jurisdiction.[6] The *Aldinger* decision deals in no respect with the question of personal jurisdiction.

Terry, Raymond, and Manitowoc are all citizens of different states. Since the amount in controversary, exclusive of interest and costs, exceeded $10,000, there exists an independent basis for federal subject matter jurisdiction for the claims asserted by both Terry and Raymond against Manitowoc. Consequently, the limitations on federal subject matter

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5. 28 U.S.C. §1332(a)(1). There is no question that the amount in controversy in this case exceeds the sum of $10,000. The trial court's judgment awarded damages in the amount of $1.5 million.

6. *Aldinger v. Howard, supra*, 427 U.S. at 14, 96 S. Ct. at 2420, 49 L. Ed. 2d at 286.

jurisdiction expressed in *Aldinger* are inapplicable in the present case. Moreover, since Article 3 of the Constitution and the *Aldinger* decision deal with federal subject matter jurisdiction, and since the jurisdictional issues in the present case concern jurisdiction over the person, there is simply no basis whatsoever for Manitowoc to attempt to measure the lower court's decision against the standards of Article 3 or *Aldinger.*

In its petition for certiorari, Manitowoc contends that the Court of Appeals improperly applied the rules set forth in *Lone Star Package Car Co. v. Baltimore and O. R. Co.*[7] In *Lone Star*, the Court of Appeals held that where a case arises under both diversity and federal question jurisdiction, issues concerning personal jurisdiction and service of process are to be decided by applying a federal, rather than state, standard. The court went on to hold in *Lone Star* that the party objecting to personal jurisdiction and service of process was, in fact, amenable to personal jurisdiction. Finally, in *Lone Star*, the court held that the individual served with process met the test of a "managing agent" such that service upon that individual was authorized under Rule 4(d) (3) of the Federal Rules of Civil Procedure.[8]

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7. 212 F.2d 147 (5th Cir. 1954).

8. 212 F.2d at 152.

In the present case, although the lower court discussed the *Lone Star* decision at length, the court stopped short of concluding that Manitowoc's employee, Nagel, was a "managing agent" within the meaning of Rule 4(d)(3). The lower court specifically expressed no view on the issue.[9]

Instead, the Court of Appeals concluded that service of process was authorized on Mr. Nagel under the state law, which authorizes personal service on a foreign corporation that has not designated an agent for service of process "by personal service on any employee of suitable age and discretion."[10] Service of process in the manner thus authorized by state law is authorized in the federal courts, even in pure diversity cases, pursuant to Rule 4(d)(7) of the Federal Rules of Civil Procedure.

Neither the Court of Appeals nor Manitowoc entertained any doubts that, if proper service had been made, Manitowoc had sufficient contact with the State of Louisiana to satisfy the constitutional prere-

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9. *Terry v. Raymond International, Inc.*, 658 F.2d 398, 403 (5th Cir. 1981).

10. La. Code Civ. Pro. art. 1261(2) (1960).

quisites to personal jurisdiction set forth in *International Shoe Co. v. Washington*[11] and its progeny. In fact, during oral argument before the Court of Appeals, Manitowoc admitted that it was "doing business" in Louisiana.

Manitowoc points out in its petition for certiorari that the Louisiana Long-Arm Statute authorizes service of process only in connection with causes of action "arising from" certain enumerated acts or omissions.[12] Assuming that this limitation in the Long-Arm Statute could have any application in the present case, the fact remains that the lower court concluded that service of process was authorized and accomplished not pursuant to the Louisiana Long-Arm Statute, but pursuant to Article 1261(2) of the Louisiana Code of Civil Procedure and Rule 4(d)(7) of the Federal Rules of Civil Procedure. The limiting language in the Long-Arm Statute is therefore of no consequence in this case.

## CONCLUSION

The stated ground on which Manitowoc seeks a writ of certiorari from this Court is that the court

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11. 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945).

12. La. Rev. Stat. §13:3202 (1964).

below has improperly expanded the subject matter jurisdiction of the federal courts. Such an assertion by Manitowoc is incorrect and represents a misplaced confusion between the principles of jurisdiction over the subject matter and jurisdiction over the person. To the extent that this Court may construe Manitowoc's petition for certiorari as requesting review of the personal jurisdiction and service of process questions decided below, Manitowoc has failed to demonstrate any legal or factual errors in the lower court's analysis. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that three copies of the foregoing Brief for Respondents have been forwarded to all counsel of record to this proceeding by placing a copy of same in the United States mail, first-class postage prepaid and properly addressed this 19th day of March, 1982.

WARREN M. SCHULTZ, JR.